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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES ARMEN CALABRESE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the attempt by counsel for a co-defendant to impeach the testimony of a Government witness that counsel had previously represented constitute manifest necessity for the Court's sua sponte declaration of a mistrial over the objection of the Government and Petitioner?

2. Did the trial court err by conditionally admitting inculpatory hearsay declarations of co-conspirators prior to requiring the Government to demonstrate the existence of a conspiracy by a preponderance of other evidence?

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Petitioner, Charles Armen Calabrese, respectfully petitions this Court to issue its Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, affirming the judgment and sentence of the District Court in this case, which opinion of the Court of Appeals was issued on March 26, 1981.

OPINION BELOW

The opinion of the Court of Appeals of the Tenth Circuit dated March 26, 1981, appears at length in an appendix hereto.

JURISDICTION

This petition for certiorari is filed under jurisdiction provided by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code, Title 18:

> Section 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting.
>
> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted, or taken by fraud; . . .

Rule 801(c) of the Federal Rules of Evidence.

> HEARSAY.—"*Hearsay*" is a statement other than one made by the *declarant while testifying at the trial or hearing*, offered in evidence to prove the truth of the matter asserted. (Emphasis added.)

Rule 802 of the Federal Rules of Evidence.

> HEARSAY is *not admissible* except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 801(d)(2)(E) of the Federal Rules of Evidence.

> A statement is not hearsay if [it is] a statement by a coconspirator of a party during the course and in the furtherance of the conspiracy.

Rule 104 of the Federal Rules of Evidence.

> (a) Questions of admissibility generally.—Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is no bound by the rules of evidence except those with respect to privileges.
>
> (b) Relevancy conditioned on fact.—When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
>
> (c) Hearing of jury.—Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

STATEMENT OF THE CASE

Petitioner and three co-defendants (Samuel Calabrese, Charles Knowles, and Albert Marchini) were indicted in the United States District Court for the

District of Utah charged with conducting a business engaged in interstate commerce through a pattern of racketeering activity (18 U.S.C. Section 1962(c)); on 15 counts of interstate transportation of property obtained by fraud (18 U.S.C. Section 2314); and conspiring to violate the Racketeer Influence and Corrupt Organizations Act (18 U.S.C. Section 1962(d)).

A. The Indictment. The grand jury charged that defendants used a Utah building supply company to obtain materials on credit through fraudulent representations; that after having received the materials, they did not pay for them; and that thereafter, they transported the materials from Utah to Nevada and California for sale at prices below wholesale cost.

B. The Mistrial. The initial trial of this cause began on October 18, 1978, and proceeded through October 24, 1978, at which time the trial judge declared a mistrial.

His cause for the declaration of mistrial was that Jack Facer, a prosecution witness who had inculpated all defendants, came under the cross-examination of Richard J. Leedy, counsel for Albert Marchini. In the course of cross-examination it was disclosed that Leedy had represented Facer in prior State court criminal proceedings. During cross-examination, Leedy sought to impeach Facer's credibility by showing that Facer had sworn that he was without assets in a pauper's oath filed in a prior State court proceeding in which he had been represented by Leedy, and that Facer had

made sworn inconsistent statements to a Federal grand jury at a subsequent time. (Tr. I, p. 5).* Facer acknowledged having filed the pauper's oath in connection with the State court proceeding and admitted giving sworn testimony thereabout at a State judicial inquiry concerning the oath. (Tr. I, p. 9). At this point, the Court halted the proceedings stating:

> It seems unseemly to me that counsel who was responsible for this questioning is now representing another client attacking his credibility.

Leedy's cross-examination before the jury was terminated at that point. There followed a discussion concerning the nature of the problem and potential cures.

Though acknowledging that he could not quite put his finger on the exact nature of the problem, the Court summarized its concern by stating that to permit Leedy to cross-examine Facer about material concerning a pauper's oath which was supplied to him as counsel and then attack the credibility of his former client in argument to the jury would "bring disrespect upon the lawyers and upon the Court."

Counsel for petitioner suggested that *he* cross-examine Facer to determine the credibility of the pauper's oath and his apparently contradictory statements to the grand jury. (Tr. I, p. 11). He argued that should it be determined that Facer had lied to Leedy in connection with the pauper's oath, the attorney/client privilege would not apply and there would be no impro-

* Hereafter, "Tr. I" references will refer to the trial proceedings in the initial trial of this cause on October 24, 1978.

priety in having other counsel call the attention of the jury to the inconsistencies. (Tr. I, p. 15). Government counsel proposed that the relationship between Leedy and Facer was not half as critical as Leedy's relationship with his client in this case, and that if Albert Marchini desired to waive any conflict of interest, there would be no bar to proceeding with the trial. (Tr. I, p. 21-22). The Government also joined the suggestion that Facer be cross-examined on the issue of his credibility by other defense counsel who would not be constrained from arguing his credibility to the jury. (Tr. I, p. 24-25). The Court briefly considered granting a mistrial and severance only as to Defendant Marchini, but promptly rejected this solution in the interest of judicial economy. (Tr. I, p. 27-28). The Court also considered recessing the trial for a brief period to permit Marchini to retain other counsel to continue the trial (which Marchini actually did for second trial of the cause which commenced less than a month later), but rejected this alternative when it was pointed out that Leedy would very likely have to be called as a witness even if the trial continued. (Tr. I, p. 30-32). The Court never did make any finding that the problem would likely prejudice the jury for or against any party to the trial. The only reference to the effect of the problem on these defendants was a passing one during which the Court obviously expressed the position that bias was secondary in its mind to some unstated notion of judicial propriety. (Tr. I, p. 27).

Notwithstanding the strenuous objection of both the petitioner and the Government, the Court deter-

mined to declare a mistrial on its own motion, "taking into consideration previous motions for mistrial." (Tr. 42).

A timely motion to dismiss the indictment on grounds of double jeopardy was filed by petitioner on October 25, 1978, and supported by a memorandum of authorities on October 26, 1978. The motion was denied at a hearing on October 31, 1978. By the time of this hearing, the Government had changed its mind and was heard to argue that the finding of manifest necessity for the declaration of a mistrial was proper in all respects. Petitioner's motion to dismiss the indictment was denied, and the second trial of the cause commenced on November 14, 1978.

C. The Second Trial. The Government's first witness at trial, Mr. Paul Warnick, former manager of the lumber business alleged by the Government to have been used in the conspiracy to procure goods fraudulently on credit, testified concerning conversations he had with Charles Knowles even before the date the alleged conspiracy came into existence. Counsel for the other defendants objected to any reference to comments made by Knowles during the course of those conversations on the grounds that they were hearsay, and therefore, inadmissible. In ruling on the objections, and consistent with a suggestion of counsel for petitioner, the Court made the following comment to the jury related to such testimony:

> THE COURT: Ladies and gentlemen, conspiracy is charged as with respect to particular

> periods of time, beginning at a particular time. And the conspiracy is charged with respect to individual defendants with Mr. Knowles.
>
> The objection has been made on the grounds of hearsay. Its the Court's responsibility to ultimately determine the admissibility of hearsay within the claim of conspiracy. The Court will hear all of the evidence on both sides with respect to this testimony to determine its admissibility. So, I am going to let it in. But, it will come in subject to the objections. And I will, at a later time, rule upon its admissibility and applicability to these defendants. (Tr. II, p. 12, Nov. 16, 1978).*

The Court then went on to grant a continuing objection on behalf of the parties relevant to any effort by the Government to introduce hearsay declarations of any of the defendants' co-conspirators. This ruling was made by the trial court in direct reliance on *U.S. v. Andrews*, 585 F.2d 1961 (10th Cir. 1978).

At the end of the Government's evidence, counsel for petitioner specifically requested the Court to make a finding as to the hearsay declarations. This motion followed motions for judgment of acquittal, and the Court's answer to the request regarding the hearsay declarations is slightly ambiguous:

> THE COURT: Well, with respect to that, I would say that presently, without finally determining the question, that there is sufficient to justify the denial of the motions.

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* Hereafter, "Tr. II" designations shall refer to the transcript of trial proceedings which began on November 14, 1978.

MR. BARBER: Would the Court consider making findings as to this issue? It is the first time it has happened in the circuit, and application, Your Honor, and I want to appeal you, because I think it is important that this circuit get the benefit of a ruling in this case. (sic)

THE COURT: Well, the Court is of the opinion that there is evidence in the record to establish that there was a conspiracy. And the conspiracy doesn't have to show, as of the time when initially undertaking, that the involvement of all those who are charged. But only that there was such a conspiracy. And that subsequent to the establishment of the conspiracy, under the *Andrews* case, that there was evidence that ties it to other alleged conspirators with that conspiracy, which may be circumstantial. And under the *Andrews* case, may even be hearsay. But the Court prefers to look at it, requiring a higher test. And the Court believes that there are—there is evidence here, essentially of the matters that have been referred to. The representations made by Mr. Knowles, the statements of Mr. Warnick to that effect. The statements that were made in the meeting in Las Vegas, which tied, substantially, the conspirators to the agreement, if believed. And the conduct of the parties. And on the Pleasant Grove end, delivering the materials. The calls that were made back by the conspirators, alleged conspirators, with respect to materials. Circumstantial evidence, if believed, could establish that they had knowledge of the plan, reference to price lists, asking about the materials that were part of it, serves to identify the transactions, circumstantially, and serves as evidence of their involvement. And the receipt of the goods on the Las Vegas end.

These are all acts that could be received with-

> out regard to the hearsay rule. The calling of others to attempt to sell the goods, the association and the renting of the warehouse to use to store the goods. The establishment of a distribution house, involving others of the alleged conspiratorial group, Peco, for the sale of the goods in a different area. The, their involvement there. And the challenge by Kiabab, the principal conspirators, not Mr. Knowles, but he gives reference to where he was present and the project was referred to.
>
> From all of these circumstantial evidence (sic), the Court believes that there is evidence which would justify the jury in concluding that there was a conspiracy. That the alleged conspirators entered the conspiracy, had knowledge of it, and participated in it by their acts.
>
> MR. BARBER: Is that by a preponderance of the evidence, then, Your Honor?
>
> THE COURT: That is by a preponderance of the evidence.

At the close of the evidence, the Court excused the jury and made the following comment to counsel:

> THE COURT: I think it would be best now to hear what you have to say for the Court's obligation to determine whether or not from all the evidence heard the Court believes there is a preponderance to show the existence of a conspiracy from independent evidence. (Tr. II, p. 2462).

Counsel for petitioner respondent with strenuous arguments that to admit such testimony against petitioner, who was a relatively minor actor in the businesses alleged to have been operated pursuant to the con-

spiracy, would be highly prejudicial and improper because the extrinsic evidence did not constitute a preponderance of the evidence that a conspiracy existed between any of the defendants or that petitioner had knowingly joined any such conspiracy. At the conclusion of these arguments, the Court ruled as follows:

> The Court appreciates the assistance of counsel. Having heard all of the evidence on both sides with respect to the hearsay question. (sic) The Court exercises its obligation to make a determination by finding that the preponderance does show that there is independent evidence of conspiracy and I won't repeat findings I made heretofore. But, they have been buttressed by defense testimony establishing many acts which further assist that determination. So, the Court will advise the jury that a ruling has been made so that they may consider the hearsay in determining the issues in this case.

As a result of this ruling, an immense number of hearsay declarations of Samuel Calabrese and Charles Knowles, the principal alleged protagonists of the conspiracy, were admitted both against them and against petitioner.

The jury convicted Charles Knowles, Samuel Calabrese and petitioner on all counts and acquitted Albert Marchini on all counts of the indictment.

On February 10, 1979, petitioner was sentenced to four years of imprisonment under Count II of the indictment and fined $5,000. Concurrent terms of four years were imposed on each of Counts IV through XIX

of the indictment, each to run concurrent with the sentences imposed on Count II and concurrent to each other. All sentences were imposed under 18 U.S.C. Section 4205(b)(2). The Court suspended imposition of sentence on Count XX and placed defendant on probation for an additional period of five years to commence at the expiration of his parole supervision under the other counts.

REASONS FOR GRANTING THE WRIT

I

TERMINATION OF PETITIONER'S FIRST TRIAL WAS IMPROPER AND HIS RETRIAL THEREAFTER VIOLATED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT

The initial trial of this case was aborted by a declaration of mistrial on the Court's own motion on October 24, 1978. Though the exact cause for the Court's action is hazy, it was occasioned by Richard J. Leedy, counsel for Defendant Marchini, who initiated an attempt, in cross-examination, to impeach the credibility of Government witness Facer by demonstrating that while represented by Leedy in a State criminal matter, Facer had sworn in a pauper's oath that he was without substantial property; but that later, he had declared his ownership of substantial property before a federal grand jury. The trial court expressed the following concern:

> THE COURT: It seems unseemly to me that counsel who was responsible for this questioning [that related to the pauper's oath] is now

> representing another client as attacking his [Facer's] credibility.
>
> • • •
>
> THE COURT: That isn't the point alone. That's just one point. The other point is it's arisen in the mind of the Court. I don't want in this Court to have Mr. Leedy as counsel for a party in his final summation attacking the credbility of the Government witnesses when one of the key witnesses is his former client and upon circumstances which among other things are circumstances in which he was involved as an actor in getting the statements that are attacked. (Transcript of trial proceedings, October 24, 1978.)

Petitioner respectfully asserts that neither this problem, nor the possibility that Leedy might be called as a witness about his relationship with Facer constituted sufficient cause to terminate this trial and subject petitioner to a second trial before a different jury.

In 1824, this Court enunciated a rule which has remained unchanged for over one hundred fifty years. *U.S. v. Perez*, 9 Wheat 579, 6 L.Ed. 165 (1824).

> We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a *manifest necessity for the act*, or the ends of public justice would otherwise be defeated.
>
> They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent cir-

> cumstances, and for very plain and obvious causes and in capital cases especially, the court should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have in the faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges under their oaths of office. (Emphasis added.) 6 L.Ed. at 166.

The phrase "manifest necessity" is oft cited in the case law. Less often remembered is the alternative suggestion that mistrials should not be declared unless failure to do so would "(defeat) public justice." The two phrases read together are a forceful and demanding expression of the Court's overriding concern that the prohibition of the Fifth Amendment not be imposed upon for trivial or illusory cause.

The Court has recently provided slightly more specific guidance as to what is meant by "manifest necessity." In *Illinois v. Somerville*, 410 U.S. 458 (1973) at p. 464, the Court, after citing numerous examples of circumstances where mistrial had been held not to bar retrial, said:

> While virtually all of the cases turn on the particular facts and thus escape meaningful categorization (citations omitted), it is possible to distill from them a general approach, premised on the "public justice" policy enunciated in *United States v. Perez*, to situaions such as that presented in this case. (The court had declared a mistrial on the state's motion over defendant's objection because the indictment was fatally de-

> ficient.) A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial.

Holding that under the circumstances in *Somerville* the declaration of mistrial did not bar retrial, the Court quoted with approval this helpful language from *Wade v. Hunter*, 336 U.S. 684 (1949), where it affirmed retrial of a defendant where technical problems having nothing to do with the proceeding itself caused the first trial to be terminated prior to rendition of a verdict.

> . . . What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in *fair trials designed to end in just judgments.* (Emphasis added.) *Wade v. Hunter*, supra, at 688, 689.

Most recently, this Court decided *Arizona v. Washington*, 434 U.S. 497 (1978). A convicted murder defendant had been granted a new trial because the State had withheld exculpatory evidence. At the second trial, defense counsel alluded to the State's misconduct in his opening statement. The trial judge declared a mistrial on the State's motion over the objection of defendant. The trial judge did not expressly find that his action was a "manifest necessity", nor did he expressly state that he had considered less drastic alternatives. This Court held that the double jeopardy clause did not bar a third trial. After reaffirming the defendant's

right to have his initial trial completed by a particular tribunal, the Court analyzed several categories of circumstances which can produce mistrials. First, it supported bars to retrial where prosecutors or judges have procured mistrial to provide tactical or evidentiary advantage. Second, it supported the rule that retrial is permissible where juries have been unable to reach verdicts reasoning that—

> . . . on the one hand, if he [the trial judge] discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his "valued right to have his trial completed by a particular tribunal." But if he fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there is significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors. 434 U.S. at 509.

Finally, the Court considered *Washington's* case where the mistrial was the direct product of misconduct by his own lawyer which, though it did not "[I]n a strict literal sense" make terminaton of the trial "necessary", justified the trial judge's finding that jury bias was likely. It held that though "great deference" must be paid to the assessment of the trial judge, the facts must convince the reviewing court that he exercised "sound discretion" in declaring a mistrial. If a trial judge acts irrationally or irresponsibility (citations omitted), his action cannot be condoned." 434 U.S. at 514. The Court concluded by holding:

> . . . We are, therefore, persuaded by the record that the trial judge acted responsibly and delib-

> erately, and accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding. Since he exercised "sound discretion" in handling the sensitive problem of possible juror bias created by improper comment of defense counsel, the mistrial order is supported by the "high degree" of necessity which is required in a case of this kind. Neither party has a right to have his case decided by a jury which may be tainted by bias; in these circumstances, "the public's interest in fair trials designed to end in just judgment's" must prevail over the defendant's "valued right" to have his trial concluded before the first jury impaneled.

Compared to the kinds of trial difficulties which have been held by this Court to justify declarations of mistrial, the problem specified by the trial judge in this case on October 24, 1978, was trivial, if not illusory. Neither the trial court nor the circuit court actually verbalized any error, procedural, legal, or factual, committed by any party in the first trial of this cause. The trial court's justification was that "it seems unseemly to me that counsel, who is responsible for this situation, is now representing another client as attacking his credibility." The Tenth Circuit Court of Appeals stated its understanding of the trial judge's concern as follows:

> The judge expressed concern that an attorney's impeachment of a former client with information obtained in their professional relationship made the attorney both a witness and an advocate for his position, injured the attorney/client relationship, and would bring disrespect upon lawyers and the court.

This statement, if it purports to be a statement of the facts, is simply incorrect, for the pauper's oath, which

was the only statement of Jack Facer about which attorney Leedy sought to question him, was a matter of public record; and though it had been prepared by Leedy and reflected information Leedy had obtained from Facer in the attorney/client relationship, his having published it in a pauper's oath, filed as a matter of public record, surrendered any claim of privilege to the information contained in the document. Leedy had not signed the pauper's oath, Facer had; and though Leedy undoubtedly advocated a legal benefit on behalf of his client based on the facts set forth in the pauper's oath, he neither vouched for nor acted as a witness for the veracity of the statements that Facer had made in the oath. The conclusion that permitting Leedy to proceed with his cross-examination would injure the attorney/client relationship is, therefore, absurd; and the assertion that it would bring disrespect upon lawyers or the court is simply not founded in fact.

More specifically, neither statute, the canons of ethics adopted in the State of Utah, nor any rule of the American or Utah Bar Association prohibit the conduct Leedy was engaged in. All those rules require that in a trial, a lawyer's primary obligations are to the Court and to his client; and no rule exempts former clients from proper cross-examination merely because of the previous attorney/client relationship between them. The Circuit Court's holding that Leedy's conduct constituted an "impropriety" was error. The Circuit Court seemed to erroneously place significant emphasis on the fact that Leedy had prepared the pauper's oath. However, it was never demonstrated in this trial that the

pauper's oath was false, or that Leedy had done anything improper in his preparation of the same based on the information provided by Mr. Facer. Government counsel specifically requested the trial court to determine that issue prior to ruling; but the Court refused. Thus, we do not have any basis for finding any "impropriety" in Leedy's conduct.

In sum, neither the trial court nor the Court of Appeals identified any error or misconduct with any clarity; nor did either cite a rule, statute, or legal principle supporting any claimed impropriety. What the trial court did, in effect, was to create the equivalent of a new canon of ethics (an action not within the competence or jurisdiction of the trial court), and used an alleged violation of that rule as a justification for depriving petitioner of one of his fundamental constitutional rights. Because it is unfounded in law or equity, the rule summarily enacted by the trial court and its use as a basis for declaring a mistrial cannot be found to be a sound exercise of judicial discretion under existing authority.

Virtually all circumstances justifying mistrial which have been held to permit retrial have gone to the integrity of the fact-finding process itself; that is, circumstances which have created a high probibility that the integrity of the fact-finding process has been biased. The situation in this case is quite the contrary. Though invited to analyze the issue of possible jury bias, the trial court did not and could not rationally find that the actions of Richard Leedy would bias the jury. And,

though the trial court did appear to consider alternatives to the declaration of mistrial, the record is devoid of statements of appropriate reasons for rejecting them. Any one of the possible alternatives would have been acceptable and fully sufficient to erase any substantial likelihood of bias in the fact-finding process. Thus, their rejection by the Court cannot be affirmed as an exercise of sound discretion.

The action of the trial court and affirmance thereof by the Tenth Circuit are precedent for the proposition that in viewing issues of mistrial and subsequent retrial, trial courts are vested with latitude of discretion equal to that permissible on questions of mere fact. The Tenth Circuit opinion is a plain violation and contradiction of this Court's prevailing rule that a higher burden is required as a precondition to invasion of constitutional rights. *Chapman v. California*, 368 U.S. 18 (1967). Where constitutional issues are involved, the courts have been required to find that the offending error was harmless beyond a reasonable doubt before the invasion can be tolerated. There was no manifest necessity for terminating petitioner's original trial. The asserted justification for the trial court's action is not based on any law or rule indicating that the conduct of the trial was inappropriate in any way. There was no finding that the jury would be biased or that the integrity of the fact-finding process would have been infringed had the case gone to the jury. The opinion of the Circuit Court below approves termination of a criminal trial without the exercise of sound judicial discretion in contravention of this Court's long-standing

prohibition against the infringement of constitutional rights without a showing that the infringement is necessary to the fair administration of justice. An important precedent to this effect should not be permitted to stand.

II

BY APPROVING CONDITIONAL ADMISSION OF HEARSAY DECLARATIONS OF COCONSPIRATORS BEFORE THE GOVERNMENT PROVED THE EXISTENCE OF A CONSPIRACY BY A PREPONDERANCE OF THE EXTRINSIC EVIDENCE, THE CIRCUIT COURT RENDERED AN ERRONEOUS DECISION WHICH CONFLICTS WITH THE DECISION OF ANOTHER FEDERAL COURT OF APPEALS.

In 1962, the United States Court of Appeals for the Tenth Circuit decided *U.S. v. Glover*, 306 F.2d 594, in which it was held:

> To render evidence of acts or declarations of an alleged coconspirator admissible against an alleged coconspirator, the existence of the conspiracy must be shown and the connection of the latter therewith established by independent evidence. 306 F.2d at 594, 595.

On January 2, 1975, the Federal Rules of Evidence were signed into law to become effective 180 days after the date of enactment. Rule 104 of those rules provides: Rule 104. Preliminary Questions

> 1.
>
> (a) Questions of admissibility generally.— Preliminary questions concerning the qualifica-

> tion of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> (b) Relevancy conditioned on fact.—When the relevancy of evidence depends upon the fulfilment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
>
> (c) Hearing of jury.—Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

In 1977, the First Circuit decided *United States v. Petrozziello*, 548 F.2d 20 (1st Cir. 1977), in which it discussed Federal Rule of Evidence 801(d)(2)(E) which provides that statements are not hearsay if they are offered against a party who conspired with the declarant, and if they are made during and in furtherance of the conspiracy. The Court recognized that the new rules changed the manner in which the exception was to be applied; for under the First Circuit's prior rules, the hearsay statements had been adduced before the jury with an instruction that they should not be considered against any alleged coconspirator unless and until the jury found, by evidence *aliunde* the hearsay declarations, that the conspiracy existed; that the individual was a member of the conspiracy; and that the hearsay

declarations had been made during and in furtherance of the conspiracy. The *Petrozziello* court held that contra that practice, new Rule 104 required the trial judge to find that the evidentiary predicate for admission of the hearsay declarations had been met.

In August, 1978, the Tenth Circuit decided *U.S. v. Andrews*, 585 F.2d 961, in which it adopted the *Petrozziello* rule, but held that the decision of the trial judge that hearsay declarations were admissible against any particular alleged coconspirator required a finding of the existence of the conspiracy, the individual's membership in it, and that the statements were made during the course of and in furtherance of the conspiracy by a "preponderance of the evidence" rather than upon "*prima facie*" evidence. The Court also decided that Rule 104(a) permits that determination to be based not only upon extrinsic evidence, but also on the hearsay evidence itself. *Andrews* goes on to hold that "Evidence of the acts and statements of other coconspirators may be admitted prior to demonstrating participation in the conspiratorial scheme by the objecting defendant, providing the foundation is subsequently laid."

On July 20, 1978, the Fifth Circuit decided *U.S. v. James*, 576 F.2d 1121, reh. en banc, 590 F.2d 575. In the first *James* opinion, the Fifth Circuit agreed with the Tenth Circuit's decision in *Andrews* that questions as to the evidentiary foundation for the admission of hearsay declarations are to be decided solely by the trial judge by a preponderance of the evidence. It disagreed with the Tenth Circuit, however, by holding

that predicate facts must be established from evidence independent of the coconspirator's statements themselves; that is, by independent extrinsic evidence without reference to the subject hearsay declarations. It then addressed itself to the mechanical difficulties presented by *Andrews* and declared that the decision on admissibility must be made, pursuant to Rule 104(c), out of the presence of the jury and prior to any proof of the hearsay declarations. I recognized that its holding would affect the order of proof in trials, but viewed that inconvenience to the Government necessary to insure that the hearsay declarations themselves not prejudice the jury or affect the trial judge's view of the Government's independent evidence.

On November 15, 1979, the Tenth Circuit specifically addressed the order of proof problem and adopted the position of the Fifth Circuit in *James*, supra. *U.S. v. Peterson*, 611, F.2d 1313. It held that (1) The trial judge alone is to make the decision on the threshold question of admissibility; (2) "Substantial" independent evidence must exist to justify the finding of admissibility; (3) ". . . It is preferable, whenever possible, to require the Government to first introduce independent proof of the conspiracy, and subsequent thereto, to establish the connection of the defendant with the conspiracy before admitting hearsay declarations of coconspirators . . . [though] where it is not 'reasonably practicable to require the showing to be made before admiting the evidence, the Court may admit the statements subject to being connected up' "; and (4) Notwithstanding the order of proof, the hearsay declarations

must be stricken unless a preponderance of evidence independent of the statements demonstrates to the satisfaction of the trial judge that the conspiracy existed; that the conspirator and the defendant against whom the conspirator's statement is offered were members of the conspiracy; and that the statement was made during the course and in furtherance of the conspiracy. Having adopted this standard, the Court then ruled that the *Andrews* decision about who was to make the determination of admissibility was to be applied prospectively only. Since *Peterson* had been tried before *Andrews* was decided, the failure of the *Peterson* Court to apply *Andrews* was not reversible error.

After *Peterson*, supra, had been decided, the Fifth Circuit, *en banc*, wrote a second opinion in *U.S. v. James*, which is reported at 590 F.2d 575. The Fifth Circuit approved the panel decision in *James* in all marial respects; reiterating that in no case are the hearsay declarations themselves to be used in resolving the foundational issue that the preferred order of proof is that the extrinsic evidence be adduced first barring extraordinary circumstances and that if the Government gets the hearsay declarations before the jury and does not ultimately meet its foundational burden, a mistrial should be declared unless the error can be cured by a cautionary instruction. The *en banc* decision also suggests that trial judges may impose more scrupulous rules to assure that defendants are not prejudiced by such hearsay declarations if the need arises.

Finally, on March 26, 1981, the Court of Appeals

for the Tenth Circuit decided the instant case. This case was tried immediately after *Andrews* had been decided and prior to the Tenth Circuit's decision in *Peterson*. The trial date was after the panel decision in *James* but before the subsequent *en banc* decision. The trial court was urged by counsel for the petitioner to adopt the order of proof requirement of *James*, but rejected that alternative in reliance on *Andrews*. The Tenth Circuit ruled that the trial court had sufficiently applied *Andrews* notwithstanding its failure to specifically state that the hearsay statements had been made during the course and in furtherance of the conspiracy because the record adequately revealed that the statements satisfied the test. As to petitioner's argument that his conviction should be reversed because the preferred order of proof as required in *Peterson* and *James* had not been followed, the Court said:

> We do not wish to intimate that a district court may depart from the preferred order of proof without some substantial reason for doing so. However, we believe that the District Court did not abuse its discretion in this case, particularly since the trial was held before the *Peterson* procedures were announced by this Court.

It is of some interest to note that the panel opinion in this case was written by McKay, Circuit Judge, who wrote a strenuous and well-reasoned dissent from the Tenth Circuit's holding in *Peterson*, supra, that the *Andrews* rule was not retroactively applicable. In *Peterson*, Judge McKay noted his view that the retroactivity doctrine utilized to affirm the conviction in *Peterson* was misplaced, stating:

> The majority opinion appears to have at its core an outmoded jurisprudential view that statutes do not become law until a court ratifies them . . . When Congress has mandated change, we are not permitted to rely on "our view . . . that the prior procedure sufficiently protected defendants from the dangers inherent in the admission of coconspirator hearsay statements." 611 F.2d at p. 1334.

If, as is the *Andrews* procedure, the *Peterson* order of proof preference is also mandated by Rule 104 of the Federal Rules of Evidence, then Judge McKay's argument in the *Andrews* dissent is equally applicable to the failure of the trial court to apply the *Peterson* standard in this case. And, if that is the case, then the circuit panel decision in this case is as wrong as was the majority opinion in *Andrews*.

Other circuits have had similar problems. In *U.S. v. Vinson*, 606 F.2d 149 (1979), the Sixth Circuit adopted the reasoning and holding of the *en banc* decision in *James*, supra. It holds, however, that the trial judge must have considerable discretion in controlling the mode and order of proof at trial. It suggests that one acceptable method is for the Court, absent the jury, to conduct a "mini-hearing" in which the Court hears all the Government's proof of conspiracy and makes the foundational decision based thereon. It also suggests that the trial judge may require the Government to adduce its non-hearsay evidence of conspiracy prior to the Court's making the foundational decision. Finally, the Court clearly permits the trial courts to admit all the evidence in the hearing of the jury and make the foun-

dational ruling based solely on the non-hearsay evidence. If the Government has met its foundational burden, then the Court can submit the case to the jury. If not, the Court should declare a mistrial unless convinced that a cautionary jury instruction would shield the defendant from prejudice. 606 F.2d 149 (1979).

In *U.S. v. William*, 604 F.2d 1102 (8th Cir. 1979), the Eighth Circuit adopted the *James* rationale without any reference to a preferred or required order of proof, in reliance on *U.S. v. Jackson*, 549 F.2d 517, 533 (8th Cir. 1977), cert. den. sub nom.; *Muhammand v. U.S.*, 430 U.S. 985 (1977); and *U.S. v. Lambros*, 564 F.2d 26, 30 (8th Cir. 1977). In *U.S. v. Nelson*, 603 F.2d 42 (8th Cir. 1979), the Court again failed to require application of the order of proof preferred in *James* and *Peterson*.

In *U.S. v. Vargas-Rios*, 607 F.2d 831 (1979), the Ninth Circuit affirmed a defendant's conviction where the trial judge had instructed the jury that they should not hold hearsay declarations or actions of other alleged coconspirators against any defendant until they found that the Government had established the existence of a conspiracy. The trial court did not instruct the jury as to whether the jury could consider the hearsay declarations themselves in making that determination. The defendant had objected to that instruction reminding the Court that it was its obligation, and not the jury's, to make the foundational decision. The Court agreed to make that decision itself and advised the jury of its decision, but failed to do so. The case was then submitted to the jury on nothing more than the traditional

hearsay instructions. On appeal, the Ninth Circuit affirmed the conviction holding that the evidence was sufficient to justify use of the hearsay declarations in evaluating appellant's guilt and suggesting that the only appropriate remedy for error in this context was an instruction striking the offensive hearsay declarations.

There are numerous other decisions from these and other circuits concerning this most common and pervasive difficulty in the trial of conspiracy cases. However, those cited serve to demonstrate the nature and extent of the problem and illustrate the mass of circuit court writing on the subject. These decisions are substantially in conflict and a result of the conflict, criminal defendants are being treated differently in the various circuits. Even in circuits where proper rules have been fashioned, their application has been spotty and inconsistent. There is a tremendous volume of appellate judicial effort devoted to these issues which decisive action by this Court will save. This is an appropriate case through which to resolve existing conflicts by issuing plain rules to govern the conduct of conspiracy trials.

JOINER IN PETITIONS OF CO-DEFENDANTS

Petitioner is aware that petitions for Writs of Certiorari have been filed by co-defendants herein. Petitioner hereby relies upon issues and authorities raised in such other petitions to the extent that the same are applicable to petitioner or supportive of issues raised hereby.

Respectfully submitted this 23rd day of May, 1981.

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3-26-81 79-1388 - 79-1390 - 79-1392

APPENDIX A

United States Court of Appeals

For the Tenth Circuit

SLIP OPINION

FILED
United States Court of Appeals
Tenth Circuit
MAR 26 1981
HOWARD K. PHILLIPS
Clerk

United States Court of Appeals

TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	Nos. 79-1388
	)	79-1390
CHARLES ARMEN CALABRESE,	)	79-1392
SAMUEL RAY CALABRESE,	)	
CHARLES R. KNOWLES,	)	
	)	
Defendants-Appellants	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D. C. No. CR-78-00087)

James N. Barber of Barber, Verhoef & Yocom, Salt Lake City, Utah, for Appellant Charles Armen Calabrese.

Oscar Goodman, Las Vegas, Nevada, for Appellant Samuel Ray Calabrese.

Michael Allen Straud, Aurora, Colorado, for Appellant Charles R. Knowles.

John Depue, Department of Justice, Washington, D. C. (with Ronald L. Rencher, United States Attorney, Salt Lake City, Utah, on the briefs) for Appellee United States of America.

Before McKAY, BRIETENSTEIN and LOGAN, Circuit Judges.

McKAY, Circuit Judge.

Facts

Defendants Samuel Calabrese, Charles Calabrese and Charles Knowles were convicted of sixteen counts of interstate transportation of stolen property (18 U.S.C. §2314), one count of engaging in a pattern of racketeering activity (18 U.S.C. §1962(c)), and one count of conspiring to participate in racketeering activity (18 U.S.C. §1962(d)). The indictment charged that defendants used a Utah building supply company to obtain building materials on credit with no intention of paying for them. The merchandise was allegedly transported to Nevada and California and sold.

Double Jeopardy

Defendants' first trial ended in a declaration of mistrial. Counsel for a co-defendant who was eventually acquitted

attempted to impeach a government witness by inquiring whether the witness had lied in a pauper's affidavit filed in an earlier criminal proceeding. The examination revealed that the attorney had represented the witness in the earlier proceeding and had prepared the affidavit he was using for impeachment.

The trial judge stopped the questioning and conducted a hearing outside the jury's presence. The judge expressed concern that an attorney's impeachment of a former client with information obtained in their professional relationship made the attorney both a witness and an advocate for his position, injured the attorney-client relationship, and would bring disrespect upon lawyers and the court.

After discussion of the courses available to cure the impropriety, counsel for Samuel Calabrese recommended mistrial as the only viable alternative. The attorneys for Knowles and Charles Calabrese joined in the motion, but the latter subsequently withdrew from it. The government opposed the motion. After further discussion of the alternatives, the judge agreed that a mistrial was necessary. Upon later inquiry by counsel, the judge explained that the mistrial "motion was granted *sua sponte* taking into consideration the previous motions for mistrial that were made." (Record, supp. vol. A, at 42).

Prior to the commencement of the second trial, defendants moved for dismissal of the indictment on double jeopardy grounds. The court denied the motions, reminding counsel that their motions had prompted the mistrial declaration and finding, in any event, that the mistrial had been warranted by manifest necessity.

A defendant may not be retried after a declaration of mistrial unless the defendant requested or consented to the mistrial or unless that was "manifest necessity" for the

mistrial. *Arizona v. Washington,* 434 U.S. 497, 505 (1978); *United States v. Dinitz,* 424 U.S. 600, 607-08 (1976) (quoting *United States v. Perez,* 22 U.S. (9 Wheat.) 579, 580 (1824)). Because we find that there was manifest necessity for the mistrial declaration, we need not decide whether any defendant was barred from objecting to re-prosection by requesting or consenting to the mistrial.

We note first that the mistrial declaration was not caused by prosecutorial or judicial overreaching. *Cf. United States v. Scott,* 437 U.S. 82, 94 (1978); *United States v. Dinitz,* 424 U.S. 600, 611 (1976). The impropriety was introduced by a defense attorney, and the government strenuously opposed the mistrial motion.

The words "manifest necessity" do not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge." *Arizona v. Washington,* 434 U.S. 497, 506 (1978) (footnote omitted). The court below was confronted with a kaleidoscope of problems, including a possible violation of the attorney-client privilege, the attorney's role as both an advocate and a witness in the proceedings, and a controversy over the ethical propriety of the attorney's prior representation of the witness. The testimony placed the attorney's ethics in issue because he had prepared the allegedly false pauper's affidavit. The exchange was prejudicial to all defendants because the jury would tend to associate this attorney and his client with co-counsel and their clients. Counsel for Samuel Calabrese and Knowles told the court they felt obligated to call the attorney as a witness on credibility. This would have deepened the conflict between the attorney's role as advocate and witness and would have exacerbated the controversy over the attorney's ethics.

The record reveals that before declaring the mistrial the

court considered a number of less drastic alternatives, including severing the trial of the defendant whose attorney had caused the impropriety, permitting him to obtain new counsel, and restricting the scope of cross-examination insofar as it related to disclosure of privileged communications. However, the court was not required to accept a solution which remedied only one of the problems or offered only temporary relief. A severance or substitution of counsel would not have removed the ethical issues raised in the jurors' minds or eliminate the other defendants' interest in impeaching the witness through use of the pauper's affidavit. Limiting the scope of cross-examination would have provided only limited relief, since counsel for two defendants indicated they would be obligated to call the attorney as a witness on the credibility issue. These or other remedial measures would not have necessarily removed the risk of bias created by the questions raised about the attorney's ethics. "[T]he overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected . . . ." *Arizona v. Washington,* 434 U.S. 497, 511 (1978). Therefore we sustain the trial court's finding that there was "manifest necessity" for a declaration of mistrial.

Motion for Change of Venue

Prior to trial, Charles Calabrese unsuccessfully moved for change of venue from the District of Utah to the District of Nevada on the grounds that he, another defendant, and witnesses they intended to call resided in Nevada, that the

cost of transporting and housing the witnesses would constitute an undue burden, and that the character witnesses enjoyed reputations for integrity in Las Vegas and therefore would be more persuasive to a jury in Las Vegas.

Fed. R. Crim. P. 21(b) permits a court upon motion to transfer a proceeding to another district "[f]or the convenience of parties and witnesses, and in the interest of justice." The decision whether to grant a motion for change of venue rests largely in the sound discretion of the trial judge. *United States v. Jobe,* 487 F.2d 268, 269-70 (10th Cir. 1973), *cert. denied,* 416 U.S. 955 (1974); *Wheeler v. United States,* 382 F.2d 998, 1001-02 (10th Cir. 1967).

While the factors cited would support the granting of the motion, when weighed in context they do not compel that result. The business enterprise that was alleged to be the front for perpetration of the fraudulent scheme was located in Utah. Eight of the government's witnesses resided in Utah, and the offices of most of the victimized building supply firms were in Utah. Utah was "the location of events likely to be in issue," as well as "the location of documents and records likely to be involved." *Platt v. Minnesota Mining & Manufacturing Co.,* 376 U.S. 240, 244 (1964). The trial judge did not abuse his discretion in denying the motion for change of venue.

Severance

Samuel Calabrese and Knowles claim that the trial judge abused his discretion by denying their motions for severance.

Contrary to Calabrese's contention, his defense was not directly antagonistic to Knowles' defense, and severance

was not required. Knowles, who managed the business in Utah, testified that his inability to pay creditors was caused by the bank's refusal to honor checks written by Samuel Calabrese, who received the merchandise in Nevada. Calabrese's defense was not inconsistent with this testimony. Calabrese testified that he had stopped payment on certain checks because he had received insufficient merchandise to warrant the payment or because he intended to substitute checks for smaller amounts to facilitate collection. Both defendants testified that other payments were completed. Both defendants sought to demonstrate that they lacked the requisite intent to defraud. Neither accused the other of criminal culpability or of possessing the intent to defraud. Therefore, it was not the case that the defenses were irreconcilable, or that " 'the jury [would] unjustifiably infer that this conflict alone demonstrates that both are guilty.' " *United States v. Becker,* 585 F.2d 703, 707 (4th Cir. 1978) (quoting *United States v. Ehrlichman,* 546 F.2d 910, 929 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 1120 (1977)), *cert. denied,* 439 U.S. 1080 (1979). One defendant's attempt to cast blame on the other is not in itself a sufficient reason to require separate trials. *United States v. Ready,* 574 F.2d 1009, 1015 (10th Cir. 1978).

Samuel Calabrese complains that the joint trial prejudiced him by necessitating his taking the stand to rebut Knowles' testimony and thus exposing him to the revelation of his former convictions. Severance would not have alleviated this problem, however, since Knowles' testimony concerning the dishonored checks was a repetition of the testimony of government witnesses, particularly the building supply company's president.

Calabrese also contends that separate trials would have avoided the impropriety leading to the mistrial declaration.

While this may be true, we cannot by hindsight find an error on this basis. A rule requiring separate trials whenever the unexpected conduct of one attorney or defendant might prejudice another would preclude the use of joint trials altogether, a result unsupported by authority. While that and other risks which typically attend joint trial should always be present in the mind of the trial court when considering severance motions, the fact that the impropriety ultimately occurs does not, standing alone, render the court's advance decision an abuse of discretion.

Knowles argues that a severance was required because the evidence of Samuel Calabrese's disposal of the merchandise, threat to a driver, and prior convictions of similar charges made it impossible for Knowles to receive a fair trial. However, since Samuel Calabrese's efforts to dispose of the merchandise and his threat were part of the conspiracy alleged in the indictment, evidence of them would have been admissible against Knowles in a separate trial. The unsavory reputation and prior convictions of co-defendants are not grounds for severance. *United States v. Knowles,* 572 F.2d 267, 270 (10th Cir. 1978); *United States v. Baldarrama,* 566 F.2d 560, 569 (5th Cir.), *cert. denied,* 437 U.S. 906 and 439 U.S. 844 (1978). We believe that this evidence did not sufficiently prejudice Knowles so as to deny him the right to a fair trial.

"To establish abuse of discretion more is required than that separate trials might have offered a better chance for acquittal of one or more of the accused." *United States v. Knowles,* 572 F.2d 267, 270 (10th Cir. 1978). The district court did not abuse its discretion in refusing to grant the severance motions made by Samuel Calabrese and Knowles.

Sufficiency of the Evidence

Conviction of defendants under 18 U.S.C. §2314 requires the government to prove beyond a reasonable doubt that defendants (1) transported in interstate commerce (2) stolen goods (3) worth $5,000 or more, (4) knowing at the time of the transportation that the goods were stolen. *Anderson v. United States,* 406 F.2d 529, 531 (8th Cir. 1969). Defendants challenge the sufficiency of the evidence as to some of these elements. In reviewing the jury's verdicts, we must view the evidence in the light most favorable to the government and determine whether a reasonable juror could be convinced beyond a reasonable doubt of each defendant's guilt as charged. *See Glasser v. United States,* 315 U.S. 60, 80 (1942); *United States v. Johnson,* 589 F.2d 716, 720 (D.C. Cir. 1978). An examination of the evidence under this standard reveals that it was sufficient to support the verdicts.

Knowles argues that the evidence failed to establish the source of the transported merchandise and thus failed to prove it was stolen. However, the evidence showed that the building supply company purchased merchandise on credit from the defrauded suppliers for the purpose of transmitting it to the Calabrese brothers in Nevada. Also, the company president testified that his practice was to list the prices for the merchandise on the invoices and send the priced invoices to the Calabrese brothers *after* he received the wholesale prices from the defrauded suppliers. This testimony indicates that the shipped merchandise came from the defrauded suppliers. Lastly, two witnesses testified that merchandise delivered to the out-of-state outlets came from one of the defrauded creditors.

Knowles and Samuel Calabrese contend that the government failed to prove that the truckloads of transported

building materials each had a value of $5,000 or more. However, the invoices provided ample proof that each truckload contained stolen goods worth at least $5,000. *See United States v. Jones,* 421 F.2d 841, 842 (4th Cir. 1970).

Knowles challenges the sufficiency of proof of the *mens rea* element. We believe, however, that the evidence on this issue was sufficient. The evidence showed that Knowles made numerous misrepresentations concerning the destination of the merchandise and the ultimate recipient's solvency. He told a witness that the company president would "stay up front and take the heat" that might result from Knowles' dealings through the building supply company. (Record, vol. 5, at 473). When the company president told Knowles that a creditor believed "that there is a rip off going on and that you are involved in it," Knowles responded, "I am." (Record, vol. 4, at 136).

Charles Calabrese challenges the sufficiency of the evidence as to all counts. The evidence showed that he set up the initial meeting between some of the conspirators. He ordered appliances from the Utah building supply company and assisted in receiving merchandise at the Nevada outlet. He attempted to sell merchandise below cost and made false representations about the source of goods. He also sought to deceive purchasers about the source of merchandise by directing a truck driver to remove the signs from a truck and by counseling the driver to tell purchasers that he didn't know where the goods came from. He threatened the driver that failure to cooperate would result in death.

Therefore, there was abundant circumstantial evidence that Charles Calabrese entered into the agreement and abundant direct evidence that he was one of the principal actors in the conspiracy. Since the evidence showed that the acts of interstate transportation were objectives of the

conspiracy, defendant's conviction on each of the interstate transportation counts and on the count charging a pattern of racketeering activity were also clearly supported by the evidence. *Pinkerton v. United States,* 328 U.S. 640, 645-48 (1946).

Declarations of Co-conspirators

Charles Calabrese protests the admission into evidence of co-conspirators' declarations under Fed. R. Evid. 801(d)(2)(E).

In *United States v. Andrews,* 585 F.2d 961, 965 (10th Cir. 1978), we held that prior to admitting a co-conspirator's declaration under Fed. R. Evid. 801(d)(2)(E) the district court judge must determine from independent evidence that it was more likely than not that a conspiracy existed, that defendant and the declarant were members of the conspiracy, and that the declaration was made during the course of and in the furtherance of the objects of the conspiracy. *See United States v. Petersen,* 611 F.2d 1313, 1330 (10th Cir. 1979), *cert. denied,* 100 S.Ct. 2985 (1980). We also said that"[e]vidence of the acts and statements of other co-conspirators may be admitted prior to demonstrating participation in the conspiratorial scheme by the objecting defendant, providing the foundation is subsequently laid." *United States v. Andrews,* 585 F.2d at 966.

These procedures were followed here. The distroct court admitted the statements conditionally. At the close of the government's case, the court found that a preponderance of independent evidence demonstrated the conspiracy's existence and the defendants' membership in the conspiracy. Since the declarants were defendants, the court effectively

found that the declarants were also members of the conspiracy. At the close of all the evidence, the district court repeated its finding that a preponderance of independent evidence showed the conspiracy's existence.

The record makes clear that the trial judge had *Andrews* in mind and understood his responsibility under the *Andrews* standards. Although he did not explicitly say that the statements were made during the course of and in furtherance of the conspiracy, the record clearly reveals that the statements satisfied this test. Under these circumstances, we cannot say that a reversible error was made.

Calabrese argues that the trial court must determine the conspiracy's existence *prior* to the admission of co-conspirators' statements. In *United States v. Petersen,* 611 F.2d 1313, 1330 (10th Cir. 1979), *cert. denied,* 100 S.Ct. 2985 (1980), we adopted the procedures set forth in *United States v. James,* 590 F.2d 575 (5th Cir.) (en banc), *cert. denied,* 442 U.S. 917 (1979). The procedure provide

> that it is prefeable, whenever possible, to require the Government to first introduce independent proof of the conspiracy and, subsequent thereto, to establish the connection of the defendant with the conspiracy before admitting hearsay declarations of co-conspirators. However, . . . in certain instances where it is not "reasonably practicable to require the showing to be made before admitting the evidence, the court may admit the statements subject to being connected up."

United States v. Petersen, 611 F.2d at 1330 (quoting *United States v. James,* 590 F.2d at 582).

We do not wish to intimate that a district court may depart from the preferred order of proof without some substantial reason for doing so. However, we believe that the district court did not abuse its discretion in this case, particularly since the trial was held before the *Petersen* procedures were announced by this court.

Prior Misconduct

Knowles argues that evidence of other acts of misconduct was improperly admitted at trial. Fed. R. Evid. 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Knowles' defense was that he intended to operate a legitimate business, and that his inability to pay creditors was the result of Samuel Calabrese's failure to pay for goods promptly rather than the result of a fraudulent scheme. To support his defense, Knowles introduced testimony that he contributed lumber to the enterprise and lost this investment when the business collapsed. To rebut this defense, the government elicited testimony from a witness that Knowles told him he had obtained the lumber on credit and that the seller was attempting to reposses it. The witness testified that Knowles said, "My name is crime and crime doesn't pay. I have countersued [the seller] through my attorney." (Record. vol. 5. at 484).

These statements were relevant and admissible because they contradicted Knowles' claim, central to his defense, that he suffered a personal financial loss in the lumber company's demise. Evidence of other misconduct is admissible to show intent when, as here, intent is in issue. *See* 2 J. Weinstein & M. Berger, *Weinstein's Evidence,* ¶ 404[12] (1980). The government's evidence tended to rebut Knowles' claim that he was a victim of circumstances and did not intend to defraud the enterprise's creditors. *See United States v. Jacobson,* 578 F.2d 863, 866 (10th Cir.), *cert. denied,* 439 U.S. 932 (1978).

Testimony was also admitted concerning Knowles' alleged use of forged cashier's checks in an unrelated transaction. The trial court ordered that some of the testimony be stricken from the record, and we believe that the remaining portion of the testimony constituted harmless error.

Prior Conviction

The government sought to elicit from Knowles an admission that nine years before trial he was convicted of an offense. Knowles' response revealed that the conviction was beyond the ten-year period established by Fed. R. Evid. 609 for admissibility of prior conviction evidence. The trial judge sustained objections to the question and instructed the jury to disregard it. When considered in context, the procedures followed by the trial court were not an abuse of its discretion.

The Trial Court's Instructions to the Jury

Samuel Calabrese challenges certain of the trial judge's instructions to the jury. He contends that the jury should not have been instructed that "[t]here is nothing peculiarly different in the way a jury should consider the evidence in a criminal case from that in which all reasonable persons treat any question depending on the evidence presented them." (Record, supp. vol. 5, at 36-37). Although this instruction has been expressly disapproved in this circuit, *United States v. Pepe*, 501 F.2d 1142, 1144 (10th Cir. 1974), it has been held not to be reversible error when there are repeated references to the reasonable doubt standard elsewhere in the

instructions. *Id.* at 1143-44; *United States v. Partin,* 552 F.2d 621, 643 (5th Cir.), *cert. denied,* 434 U.S. 903 (1977). Here the instructions mentioned the reasonable doubt standard at least twenty-one times and the court explained that "[a] reasonable doubt exists whenever after careful and impartial consideration of all the evidence in the case the jurors do not feel convinced to a moral certainty that a defendant is guilty of a charge."[1] (Record, supp. vol. 5, at 35). *See United States v. Pepe,* 501 F.2d at 1143-44. It must also be remembered that "a single instrauction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten,* 414 U.S. 141, 146-47 (1973). Therefore, although we repeat our disapproval of this instruction, we hold that it was not reversible error in light of other instructions given by the trial court.

Relying on *United States v. Stanfield,* 521 F.2d 1122 (9th Cir. 1975), defendant challenges the court's instruction that "[y]our sole interest is to ascertain the truth from the evidence in this case." (Record, supp. vol. 5, at 38). In *Stanfield* the trial judge's unorthodox opening remarks may have left the jurors with the understanding that it was their duty "to decide the case only by determining which of the two sets of purported facts was true" without regard to the reasonable doubt standard. *Id.* at 1126. By contrast, the instruction here was simply an explanation that the jury's duty included resolving credibility issues, and did not create the impression that the jury's duty was merely to adopt one of two versions of the facts, regardless of the reasonable doubt standard.

[1]Contrary to defendant's contention, the "moral certainty" definition as employed in the circumstances here was at most curative, and not objectionable. *See* United States v. Pepe, 501 F.2d 1142, 1143 (10th Cir. 1974); United States v. Smaldone, 485 F.2d 1333, 1348 (10th Cir. 1973), *cert. denied,* 416 U.S. 936 (1974).

Samuel Calabrese failed to raise at trial his other objections to the instructions. We have determined that the challenged instructions do not constitute plain or grave error amounting to the denial of a fundamental right. No other review is required. *United States v. Harper,* 579 F.2d 1235, 1239 (10th Cir.), *cert. denied,* 439 U.S. 968 (1978); *Lowther v. United States,* 455 F.2d 657, 664 (10th Cir.), *cert. denied,* 409 U.S. 857, 887 (1972).

Request for Written Instructions

Knowles contends that the trial judge improperly denied his request for written jury instructions. Giving the jury a copy of the instructions is desirable in complex cases, *see United States v. Standard Oil Co.,* 316 F.2d 884, 896 (7th Cir. 1963), but the practice is within the sound discretion of the trial judge. *Oertle v. United States,* 370 F.2d 719, 729 (10th Cir. 1966), *cert. denied,* 387 U.S. 943 (1967); *United States v. Conley,* 503 F.2d 520, 522 (8th Cir. 1974). We find no abuse of that discretion here.

Multiplicity and Duplicity

Knowles argues that a number of the counts alleging interstate transportation of stolen property were multiplicitous and duplicitous, because in some instances the contents of several truckloads of stolen merchandise were recorded on single invoice form, and in other instances two invoice forms were used to list the contents of a single truckload. The number of invoice forms used to record merchandise, however, is irrelevant. The graveman of a violation

of 18 U.S.C. §2314 is transportation of stolen goods in interstate commerce. Each act of interstate tranportation involving goods of the requisite jurisidctional amount is chargeable as a separate offense. *See United States v. Gotches,* 547 F.2d 80, 82 (8th Cir. 1977); *United States v. Dilts,* 501 F.2d 531, 534 (7th Cir. 1974); *see also Badders v. United States,* 240 U.S. 391, 394 (1916). Therefore, the counts were not multiplicitous or duplicitous.

Knowles' argument that grouping two invoices in a single count is an improper means of achieving the §2314 jurisdictional amount is similarly flawed. It is of no consequence that the property in a single truckload was represented by more than one invoice.

Pattern of Racketeering Activity

Knowles argues that the interstate transportation of numerous truckloads of stolen building materials did not constitute a pattern of racketeering activity with the meaning of 18 U.S.C. §1961(1), because the transactions were between the same parties and thus constituted "a single customer transaction." The clear language of the statute refutes this argument. Section 1961(1) defines "racketerring activity" as "(B) any act which is indictable under . . [18 U.S.C.] sections 2314 and 2315." Section 1961(5) defines a "pattern of racketeering activity" as "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter, and the last of which occurrred within ten years . . . after the commission of a prior act of racketeering activity." The government established the §2314 offenses and proved they were committed within the statutory period and pursuant to a single, continuing

enterprise. *See United States v. Kaye,* 556 F.2d 855, 860-61 (7th Cir.), *cert. denied,* 434 U.S. 921 (1977). Thus the government proved a pattern of racketeering activity.

Pretrial Agreement

Knowles contends that the government improperly withdrew from a pretrial agreement in which defendant agreed to plead guilty to the conspiracy count and testify truthfully in the grand jury and trial proceedings and the government agreed to dismiss the remaining counts at the sentencing stage. Before trial, the government advised Knowles' attorney by letter that it considered the agreement null and void because of Knowles' failure to abide by its provisions and that it intended to prosecute Knowles on all counts. The government filed a sealed copy of the letter with the trial court.

Defendant apparently did not object to this letter at the time. Neither did he plead guilty to any count or testify for the government. Following his prosecution and conviction on all counts, defendant moved to vacate the sentence, alleging that the government had breached the agreement and rquesting a hearing.

The government's response included a sworn statement by a Department of Justice attorney attesting that after signing the agreement defendant refused to give any statement to the F.B.I. agent who repeatedly attempted to interview him and that defendant notified the agent that he would not cooperate in the investigation or testify at trial. The statement also attested that the attorney later met with defendant and told him that defendant had failed to abide by the plea agreement's terms, and that he must advise the

attorney within one week whether he intended to plead guilty and testify for the government. Defendant replied that he would talk to his counsel and notify the government attorney of his decision. However, the government attorney heard nothing thereafter from the defendant or his counsel regarding a guilty plea or testimony.

The government argued that defendant's conduct violated the agreement, and the government particularly pointed to language in the agreement providing that

> [t]he defendant, CHARLES R. KNOWLES, understands and agrees that if he wilfully fails to comply with any part of this agreement, or that if he fails to tell the complete and entire truth as to any material matter to agents or attorneys for the United States, or if he fails or refuses to testify truthfully as to any material matter in any Grand Jury or trial proceeding, this agreement is null and void, [and] all charges can and will be brought against him. . . .

(Record, Pleadings, vol. 2, at 215).

The district judge denied defendant's motion to vacate, specifying that he believed that defendant had the burden of proving a breach by the government, but that in any event the government had introduced a sworn statement alleging facts amounting to breach, and the defendant had produced no evidentiary support for his assertion of breach by the government.

Courts have frequently looked to contract law analogies in determining the rights of defendants aggrieved in the plea negotiation process. *See Cooper v. United States,* 594 F.2d 12, 15-16 (4th Cir. 1979); Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains,* 66 Cal. L. Rev. 471, 530 (1978). It is clear that a defendant's failure to fulfill the terms of a pretrial agreement relieves the government of its reciprocal obligations under

the agreement. *United States v. Simmons,* 537 F.2d 1260, 1261 (4th Cir. 1976); *United States v. Resnick,* 483 F.2d 354, 358 (5th Cir.), *cert. denied,* 414 U.S. 1008 (1973); *United States v. Nathan,* 476 F.2d 456, 459 (2d Cir.), *cert. denied,* 414 U.S. 823 (1973).

The analogy to contract law doctrines is not determinative in the area of plea negotiation, however. Because important due process rights are involved, plea negotiations must accord a defendant requisite fairness and be attended by adequate "safeguards to insure the defendant what is reasonably due [in] the circumstances." *Santobello v. New York,* 404 U.S. 257, 262 (1971); *see Cooper v. United States,* 594 F.2d 12, 15-20 (4th Cir. 1979).

We believe that one requisite safeguard of a defendant's rights is a judicial determination, based on adequate evidence, of a defendant's breach of a plea bargaining agreement. The question of a defendant's breach is not an issue to be finally determined unilaterally by the government. *United States v. Simmons,* 537 F.2d 1260, 1261-62 (4th Cir. 1976). If the pleadings reveal a factual dispute on the issue of breach, the district court must hold a hearing to resolve the factual issues. If the pleadings reveal no disputed factual issues, no hearing is necessary and the court may determine the issue of breach as a matter of law.

We believe that constitutional principles of fairness also require that once the government acknowledges the existence of an agreement, the government has the burden of establishing a breach by the defendant if the agreement is to be considered unenforceable.

In this case there was a judicial determination of breach. Although the trial judge incorrectly believed that the burden of persuasion was on defendant, he did not rest his decision on that belief, but rather weighed the government's sworn

statement against the "complete absence of evidentiary support for defendant's assertion that the government breached the agreement." (Record, Pleadings, vol. 2, at 230-231). Since defendant failed to produce an affidavit or any other evidence raising a factual dispute,[2] summary disposition of the issue was proper.

The above framework and analysis assume that defendant had an adequate opportunity to respond to the government's pleadings on the issue of breach. This assumption, however, is put at issue by the record. The defense attorney's reply to the government's sworn statement alleged that defendant had been transferred from the county jail to a federal facility and that defense counsel had not yet learned of defendant's whereabouts at the time of filing the reply. Therefore, we remand to the district court for a determination whether, between the filing of the government's sworn statement and the court's order, defendant had an adequate opportunity to supplement his pleadings with an affidavit or other documents disputing the facts alleged in the government's statement. If he did not, the trial court must allow defendant to file such documents and must then redetermine the issue of breach under the framework outlined above. If defendant's failure to file such documents before the motion was denied was caused by the fault of defendant or his counsel rather than by the government's exercise of control

[2]Defendant's attorney alleged in an unsworn pleading that the F.B.I. agent "harassed [defendant] in such a manner as to prevent cooperation." (Record, Pleadings, vol. 2, at 222). Were this allegation submitted in a sworn statement it arguably might have sufficiently disputed the government's sworn statement to warrant an evidentiary hearing on the issue of breach. However, we think that the trial judge could have properly concluded that defendant's subsequent conversation with the government attorney and his failure to contact the attorney, plead guilty, or testify constituted a breach of the agreement.

over defendant in transferring him to another facility, defendant will not be allowed to file such documents, and the trial court's order will be affirmed.

The judgments in Nos. 79-1388 (Charles Armen Calabrese) and 79-1390 (Samuel Ray Calabrese) are severally affirmed. In No. 79-1382 (Charles R. Knowles) the case is remanded for further proceedings in light of this opinion.